

Supreme Court, U.S.
FILED

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In the
Supreme Court of the United States

GERKE EXCAVATING, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

LIST OF ALL PARTIES

Petitioner: Gerke Excavating, Incorporated

Respondents: United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Gerke Excavating, Incorporated, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gerke Excavating, Inc. (Gerke), respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 412 F.3d 804 (7th Cir. 2005), Appendix (App.) A. The opinion of the district court, filed on April 7, 2004, was not published but is included in App. B.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 21, 2005. That court's denial of the Petition for Rehearing and Rehearing En Banc was entered on August 17, 2005, App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS AT ISSUE

The United States Constitution provides that Congress has power "[t]o regulate commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.

The Clean Water Act (CWA) provides in pertinent part:

Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill materials into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5)-(7) (CWA § 502(5)-(7)).

Federal regulations define "waters of the United States" to mean:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or . . .

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R § 328.3(a) (2005).

Federal regulations define "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c).

INTRODUCTION

This case raises questions about both the statutory scope of the CWA as implemented by the United States Army Corps of Engineers (Corps), and the extent of federal regulatory control over the Nation's wetlands under the Commerce Clause. On October 11, 2005, this Court granted certiorari in the case of *Rapanos v. United States*, 04-1034. That case presents identical statutory and constitutional questions. Accordingly, certiorari in this case is warranted.¹

Gerke has been found liable for a civil penalty of \$55,000 for having discharged a pollutant into "navigable waters" without a Corps permit. The Corps's assertion of jurisdiction over the wetlands in question requires an interpretation of the Clean Water Act that this Court has never sustained and arguably rejected in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*)—an interpretation that has created a stark conflict among the Courts of Appeals and that raises serious constitutional questions.

STATEMENT OF THE CASE

This action concerns work done by Gerke on an undeveloped 5.8-acre tract of land owned by Managed Investments, Inc., and located in Tomah, Wisconsin. Appendix (App.) at B-3. The property is bordered on the east, north and south by roads and thoroughfares, and on the west by a drainage ditch. This ditch runs underneath a driveway to empty

¹ Because this case presents identical questions to those presented in *Rapanos*, it would be appropriate for this Court to grant certiorari and to hold the case pending the outcome in *Rapanos*.